F 198
.W33
Copy 1

PREFACE.

The following, documents, (having been much sought for, although one of them has been partially published,) are given to inform the public more correctly and fully on a subject highly interesting to our City. The two first opinions were officially communicated to the Board of Aldermen, at its request: the last is unofficial. Whilst argumentative, able, and conclusive, it will be seen that they are temperate, decorous and respectful; containing neither crimination or recrimination, in a case which has excited the general disapprobation, reprehension and disgust, of the community, against certain individuals already too well distinguished to require to be named here. As the official opinions are in possession of the Board and not directed to be published we could not procure them. After repeated applications, the substance and so much of the form as was contained in loose notes and memoranda in the hands of the authors have been procured: but, although in principle and substance they are, generally speaking, the same as the official reports; they are certainly less perfect in form, if not otherwise. The variation in either it is presumed, however, is not material as respects the merits of the questions discussed or decided.

Mr. Coxes' opinion is added to those of the Mayor and and law officer of the Corporation from a desire to give every information; from our high opinion of his professional standing; and because, from his well known politics, (the worst of both political and personal feelings having entered into a contest, which has already produced, and is daily accumulating, various public inconvenience and injury,) it cannot be supposed that he was at all biassed or influenced by any other considerations than those which belong to the case itself. Comments have been deemed unnecessary if not improper.

RESOLUTION, AUGUST 8, 1830.

"Resolved by the Board of Alderman that the Mayor be "and he is hereby respectfully requested to lay before this "Board at its next meeting, his opinion as well as "the opinion of the law officer of the Corporation, or "in case of his absence from the City, of any other per- "son learned in the law, as to the power vested by the "present laws in the Mayor and Board of Aldermen to fill "the office of Collector of taxes for the third and fourth "wards, vacated by the dimissal of Joseph Ingle late, Collec- "tor, so as legally and effectually to provide for the collec- "tion of the taxes due in said wards, for the remainder of "the current year."

MESSAGE

OF

JOHN P. VAN NESS,

Mayor of the City of Washington,

Respecting the Removal of the Collector of the Third and Fourth Wards.

Mayor's Office, August 23d, 1830.

To the Board of Aldermen:

The resolution of your Board, communicated to me a few days since, requesting my opinion "as to the power "vested by the present laws in the Mayor and Board of Al- "dermen to fill the office of Collector of Taxes for the Third "and Fourth Wards, vacated by the dismissal of Joseph In- "gle late Collector, so as legally and effectually to provide for "the collection of the taxes due in said wards, for the remain- "der of the current year," has had that consideration to which it is entitled, from its intrinsic importance, from the public character and respectability of the Board, and from the honor done me by the request.

I shall proceed, without technicality or formality, (for I posess sneither) to give my convictions on this subject, and some of the reflections and reasons which have conducted me to them: and if, in doing so, I am occasionally crude and obscure, I must trust to that indulgence which the Board will politely extend to one not habituated to writing, and still anxious to elucidate a subject on which *both* are desirous to be informed, however awkwardly it may be done.

Had the Board been a little more definite, and precise, specifying the particular points on which doubts existed, they would probably not have been exposed to the inconvenience of reading a great part of this reply; but having presented to me only the general terms *"legally and effectu-*

ally," without any specification or indication, I must necessarily be more broad and diffuse, than would otherwise have been required.

The question of the *right* of removal, as well as that of the *actual* removal, not being distinctly presented by the letter of the resolution, but rather admitted, I shall not introduce *either*, except, perhaps, collaterally, as in some degree connected with the general subject. And here permit me to observe, that it gives me pleasure to find that, notwithstanding the temporary effects, not unusual, of the excitements of a recent animated election, on those who took a warm interest in it—there is not, at this moment, a single grave doubt of the existence of that power which the City Councils themselves, after many years experience and practice of our local system of legislation, applied for by a formal and solemn official act, and which Congress conferred in terms as explicit, unequivocal, definite, and conclusive, as language can furnish. Assuming, then, the admission of the right of removal, as well as of the fact of the vacancy, I shall proceed to the questions propounded in the resolution. As to one branch of the proposition; viz: "The power vest-"ed by the present laws in the Mayor and Board of Alder-"men, to fill the office of Collector of Taxes for the 3d and "4th wards vacated by the dismissal of Joseph Ingle." I might abruptly say the act of our incorporation—of our creation—from which alone we derive all our powers, and which prescribes our duties, by which alone "we live, move, and have our being," says the Mayor "shall nominate, and, "with the consent of the Board of Aldermen appoint, to all "offices under the Corporation, (except Commissioners of "Election.") Here, then, is a perfect case for the exercise of this power. An office under the Corporation (other than that of Commissioner of Election) as vacant as if it had never been filled. The office is created for important public purposes, and it is our duty to fill it. The Charter gives the "full "power and authority to lay and collect taxes;" "and to pass "all laws which shall be deemed necessary and proper for car-"rying into execution the powers vested by this act in the "said Corporat on or its officers." Our Legislative body, acting under this creating, and controlling law, and for the very purpose of carrying its provisions into effect, has this law upon its table—its eye fixed upon it at every step. Has that body then, under such circumstances, left any difficulty, any contingency, unprovided for, that might embarrass or counteract the full exercise of that power which is the first in

rank and importance of those specified in our charter, and which is absolutely indispensable for our corporate existence? They knew, they saw at every glance at our fundamental law, which they were sacredly and solemnly bound by more obligations than one, to execute and maintain, that the Collector was removable, "at the will and pleasure of "the Mayor." Nay, I repeat their own experience had taught them the necessity of that power; and to their solemn application it was granted. Are they, then, justly obnoxious to the charge of having neglected or omitted to provide, in their tax code, for the contingency of the removal of a Collector, or of leaving that code so doubtful of construction as to admit of the possibility of evil or embarrassment? The patriotism, the virtue, the public spirit, the information and talents, as well as the self interest of the councils forbid or refute the charges. There is in reality no such difficulty or embarrassment, as a brief review and a fair construction of the laws of the Corporation will prove. In doing this we must keep in mind that laws are mainly to be interpreted by their context, subject matter, effects and consequences, and their reason and spirit; words are always to be considered and construed with a regard to those. It has not escaped me that the "*present laws*" are particularly enquired for; but, besides that the origin and progress of our legislation on this subject, are interesting, as to its general policy and plan, and useful for the purposes of illustration and explanation, it must be remembered that the "*present laws*" consist not only of late enactments; but also of all former ones, not repealed, either directly or indirectly: and there are several such.

With the rules just laid down before us, which are of the highest authority of our most profound jurists, (and they are the maxims and principles of reason and common sense as well, as of law) let us look into our laws. Without recurring to those early numerous instances of changes of systems, of laws, and of offices, at the commencement, the middle, and end of the year, which crowd our statute book, I will begin with the law of Oct. 30th, 1810, entitled "an "act for the appointment of ward Collectors, and for other "purposes." The Mayor is here authorized to appoint collectors to continue in office "*until the 2d Monday in June "next, and annually thereafter, to continue in office for "one year*" In this act there is no express provision for the contingency of a vacancy *from any cause whatever;* yet will it be contended that a vacancy caused by *death* could

not have been filled by the Mayor, who had then the sole appointing power? Was it the intention of, and the practice under, that act that the whole collecting machinery should, in case of a vacancy, stand still until the end of the current year, or that the legislature should be assembled to provide for every individual case? Certainly not. By this act the Collectors are to return monthly accounts, and to make monthly payments to the Register and the bank; a provision never repealed or annulled. The Collector, previous to his entering on the duties of his office, was to enter into bond "diligently, faithfully, and honestly, to execute, "perform, and fulfil all the duties required of him by this act, "or which may be imposed on him by any future act or acts "of the said City Council." This provision is still in force.

By the law of October, 1816, entitled an act supplementary to "an act for the appointment of ward Collectors, and "other purposes," the Mayor, (Sec. 1,) was "authorized and "required to appoint, *on or about the* 1st *of January next*, "*and annually thereafter, and also whenever a vacancy* "*shall happen by death, resignation, or otherwise*, Collec- "tors of the taxes due this Corporation; which appointment "shall be submitted to the Board of Aldermen, at their first "session thereafter.

"Sec. 2. It shall be the duty of *said Collectors* to do and "perform all such matters and things, which have [been,] "*or may be*, imposed on them by the laws of the Corpora- "tion, to collect all taxes placed in their respective hands by "the Register, and deposit all moneys by them received, on "or before the 1st day of every month," &c.

What Collectors were to perform this duty of collecting and depositing the taxes, which was the object and purpose of the law? Assuredly either those in the *first instance* appointed, or those that were *afterwards to be* appointed upon the occurrence of vacancies. *Both* are equally comprehended by the express letter of the law, and much more so, still, by its spirit and intention. It was neither absurdly supposed by the law that a Collector would act after his death, or that the collections and deposits should cease upon such an event, when it is said, (Sec. 3,) that "all future ap- "pointments of Collectors shall cease and determine on the "31st December annually." The true meaning of the law is that the term of office shall not *exceed* that day, whether the appointment, were *original or to fill a vacancy*. To that day the term was to extend, if not abridged by unavoidable causes. The law did not preposterously mean to com-

pel the incumbent to live to the 31st December, or not to resign until that day; or, what was equally out of its power, to deprive the Mayor of the right of *removal;* or to prevent the Councils themselves from intermediately legislating him out of office, as they had before done in similar cases, and is a familiar practice in all Governments, both great and small; or in case of either of those contingencies say within ten days after his original appointment, that there could be no other appointment—thus defeating the whole object of the law, and violating its previous provisions. The power of removal had, but a moment before, been expressly recognised in the same law; and, besides flying in the face of the charter, it would have been absurd and inconsistent *now* to deny it, and a want of prudence to leave the public interest unguarded against any injurious effects of its exercise. Every appointment is necessarily, as to its duration, within the term of a year, a conditional one. The Corporation knows it—the Collector knows it: every law, therefore, relative to his conduct and duties—every step taken by him, has constantly in view that condition. Neither the Councils or the officer can defeat or evade it. The last mentioned law proceeds, "And it shall be the duty of "the said Collectors within ten days *after the expiration "of the time they shall respectively act as such*, to return "to the Register the list of taxes for the preceding year "which had been placed in their hands for collection: and "if any Collector shall fail to make return of the lists afore-"said within the time *herein limited* for that purpose, he "shall forfeit and pay the sum of $100 to the Corporation; "and it shall also be their duty, within the same period of "ten days, to settle their respective accounts with the Reg-"ister." Can any thing be more definite and conclusive than a part of this language to prove that the law was to apply to the subject at the end of the Collector's service, whenever that should legally be? It would not be difficult for a literary critic to point out, now and then, a word, or even a phrase in this law, as well as in others, not the most literally appropriate to express the intended idea: but take the whole context of the law; consider its subject and object; its reason and spirit; make the different parts, in substance and effect, consistent with each other; and where is there any room for a solitary doubt that it meant the appointment could be terminated by *removal*, as well as any other means; that the late incumbent is, *in such case*, under the same obligation to return the lists, settle his accounts

&c., as if the *nominal term* of a year had expired? It is not necessary for lawmakers to be hypercritics: if it were so, the true and substantial interests of the community would be in bad keeping.

I pass on to the law of August 1819, "imposing an annu-"al tax and providing for the collection thereof." Not one of the previous provisions relating to the subject before us, was thereby repealed; although the duties of the collector are considerably increased and modified.

Next comes the law of Nov. 1820, entitled "An act pro-"viding for the appointment of Collectors of Taxes in the "City of Washington." This law, whilst varying the number of collectors (discharging in the midst of a term a part of the incumbents) enacted "that it shall "be, and it is hereby declared to be, the duty of the "Mayor, on or about the 1st of January next, and on or "about the 1st of January, annually thereafter, and also "whenever a vacancy shall happen by death, resignation, "*removal* or otherwise, to nominate, and by and with the "advice and consent of the Board of Aldermen, to appoint Collectors," &c. They are to perform the "duties now im-"posed on the several Ward Collectors." They are, "before "entering on their duties to execute bond with the condi-"tions required by existing laws on the subject." (See the condition given above in the act of 1810, never repealed or annulled.) By the 4th sec. it is made "the duty of the "Register to *place in the hands of the Collectors* the whole "amount of taxes, (the lists) for collection, according to the "rule prescribed by the laws of this Corporation, on or be-"fore the 1st January annually, and to cause their accounts "to be settled on or about the 1st January annually."

Here is evidently the *nominal* and *general* term of the appointment given. It was to continue so long, if not interrupted or abridged by any legal act or cause. It had already been admitted that vacancies by *removal* and other causes might happen; and they had been in part expressly provided for:—surely it was not the intention of this section now to *deny* that a vacancy might thus occur, and the *nominal term* be thereby shortened. This would be absurd in itself as well as inconsistent with the previous part of the same law, as likewise with the fundamental and controlling act of incorporation. The obvious import and meaning is, that when the collector shall cease to hold the office, his accounts shall be settled; not that if he dies, resigns, or be *removed* his accounts shall remain *in statu quo* until the first of Jan-

uary afterwards! Whoever, indeed, happens to be the incumbent for the latter part of the preceding year, must settle on or about the 1st of January. So, as to the delivery of the tax lists, it is to be done by the Register to the Collector when he shall enter on the duties of his office, which is *nominally* and generally, on or about the 1st of January: but may be varied in point of time, according to the legal and unavoidable contingencies of death, resignation, *removal, &c.* Let us for a moment suppose (an extreme case) that the Mayor and Board of Aldermen were so regardless of their oaths, of their duty, and the public interest, at the commencement of any year, as not to make an appointment of a Collector until the *1st of July ensuing;* would the Register for that reason be *exonerated* from the duty of delivering the lists or books because the law directs him to do it "*on or about the first of January?*"

Whenever there is a constitutional principle stated or clearly recognised in a law, every subordinate provision, all its practical details, relating to the same general subject, must be supposed to be intended by the law itself to conform or yield to that principle. If the right of *removal* and appointment to the vacancy are thus recognised, then the right to do every thing necessary to enable the successor to execute the duties of the office in like manner as the predecessor was enabled to do them, during his incumbency, is irresistibly to be inferred or implied. The tax lists are public property: they are "placed in the hands of the Collectors" to facilitate and effectuate the great object of the law, the collection of the taxes. After *removal*, the late incumbent is no more a Collector, than he was *before his appointment:* and, is no longer entitled to the list, except so far as it may be necessary to a prompt settlement of his accounts. To use the language of the law "they are "placed in the hands of the Collector;" and it shall be his duty, within ten days *after the expiration, of the time he shall have acted as such "to return to the Register "the list of taxes." &c.*

The law of May 24th,, 1822, supplementary to that last quoted, makes it "the duty of the several Collectors of "Taxes in the City of Washington, to render on or "before the *first day of December* in each year, to the "Register their respective accounts: showing the whole "amount collected, and from whom, the amount deposited "in the City Treasury; the amount of taxes remaining un-"collected, and by whom due; and the reasons why such

taxes have not been collected; and it shall be the duty of the Register, as soon as such accounts shall have been rendered to him, to audit, examime and adjust the same, and report the results to the Mayor," &c.

The purpose of this law is, only, advantageously to alter the day on or before which the duties previously enjoined are now to be performed; and to be more particular and strict in the requisition for the accounts of Collectors. Those who should *then be* in office were annually to account on the *first of December*, and not on the *first of January*, as before. None of the principles or enactments of the law, applicable to the present case, were at all varied from pre-existing ones.

I am not aware of any subsequent or other law, having a material bearing on the subject under consideration: if there be any, the Board will be pleased to supply the omission, and graduate their estimate of the arguments adduced in this opinion, according to the additional matter they may find.

Take, then, these laws separately; is there any one of them which does, according to the rules of reason and common sense, nay—according to the soundest doctrines of legal construction and interpretation, militate against the conclusion that the case is a plain one, to which the existing laws are fully competent? But take them altogether, as parts of a whole system upon the important subject to which they apply, (and this would perhaps be the fairest way to consider them,) and is not the conclusion the same?

To an external and general observer, one whose time and engagements do not admit of close examination or investigation, or to one under the influence of passion or prejudice, however honest, who may have met with a few ambiguous or careless detached words, or even sentences, such as are apt to float on the surface of almost every subject, *this* may appear enveloped in a little mist or confusion, from the pile of enactments in relation to it. But, when it is probed, developed, and analyzed, every thing is perfectly lucid: doubt is dispelled: indeed, there is scarcely room for argument itself. The petty verbal criticism and sophistry which have been dealt in, out of doors, are as much beneath the notice as the dignity of the Board, and are insulting to the good sense of the people whom we represent.

I have to my surprise heard it whispered or suggested that there is, or has been an idea, that the romoval, or a

new appointment, would, as to the results, have something of an *ex post facto character*, or operation in it. To whom or how, and in what respect, can such a principle apply? Whence can such a consequence arise? There is not even an alteration of the law since Mr Ingle's appointment. He, as well as his sureties, knew *then* that his removal at any time would be legal. They knew that the duties of his office might legally be increased, and even his compensation reduced; at the discretion of the Councils. They knew that he received the tax lists or books, as the property of the Corporation, merely to facilitate the exercise of the duties of his office. When those duties were performed or ceased, the reason for his retaining the books, also ceased; as in the case between every agent and his Principal Even Mr. Ingle's bond pretends to, or claims, no definite or specific term of service or office as some apprehended: "Whereas the subscriber Joseph In-"gle, hath been duly appointed Collector of the 3d and 4th "Wards, according to law: Now the condition of this bond "is that if the said Joseph Ingle shall faithfully and honestly "perform the duties of the said office, according to law, then "this obligation to be null," &c. We have already seen what the law is. The bond runs in perfect harmony with it: indeed it is founded on it. Had it been otherwise it would have been an attempt as vain as suicidal to contravene the most salutary provision of law on a most vitally interesting subject which was always to have a perfect guarantee for the officer and sureties of the faithful collection and payment over of the taxes. But had the law relative to Collectors ever been, or were it to be altered, what then? Whenever an alteration is found by experience or deemed to be, for the public good, whatever may be the effect on the officer it may be made. The principles of all laws and legislation, the daily usage under those of the United States (whether as to Collectors or other officers) sanction and sustain such a practice. In this particular case the law and the bond, not to say any thing of the vital interests of the community, together with general usage from the earliest period of our incorporation, completely do so. The Collector is subject to all the laws in force *when he acts*. Every individual act is to be governed by the law existing at the time of its performance. He may resign if he pleases either under the old or new laws, should the duties at any time become too onerous, unpleasant or unprofitable. Suppose, during the nominal year for which a Collector is appointed, a new

system of collection be adopted, a case that has actually occurred with us, and is familiar and common every where, either modifying or abolishing the office, would then the incumbent say I will hold my office, in defiance of you until my regular term, as it was at the time of my appointment, shall expire; or, in the other case, subject only to the duties and entitled to the pay as they stood when I received the office?

The power of the Mayor to remove *directly* is as perfect as that of the Counciis to remove *indirectly*, or to modify or abolish.

Can any *expost facto* principle or effect be detected apprehended, as relates to the Register, or any other offier? The above principles must apply. Where can it be? Here also I am obliged to grope my way in the dark. It is specially proscribed as the legal duty of the Register, "to superintend the collection of the taxes." If the late Collector, regardless of his duty as an officer and of his character as a man, should refuse or withhold the tax lists, the Register has the means, the power, and doubtless the disposition and it will be his duty, to furnish new ones from the same varied, however, and corrected by the previous monthly statements or returns of the late Collector. This duty, though rather unusual, from the rareness of the case, will be perfectly official and consistant with general duty.

As to the Mayor, it is his general duty "to see that the laws be executed." Will he hesitate to prevent, by all the legitimate means in his power, any injurious consequences from the exercise of a legal right for which he is willing to take the responsibility?

I have endeavored to shew the perfect "*legality*" of the appointment; with a view to the collections, for the remainder of the present year; and in doing so, have necessarily drawn into the scope of my argument, the subject of the "*effectual*" collection, and on that branch will add a few remarks. If the late collector has as it is fair to presume, done his duty in rendering monthly accounts, before his removal, there can be no dificulty at all, except only as to the collections of June last. But admitting that, from the want of settlement by Mr Ingle, it is not practicable to furnish the new collector with an accurate list of uncollected taxes; still, no material injury can arise to the successor, to the Corporation, or to the citizen. Whoever pays his tax, invariably receives a voucher or acknowledgment for it. He is, it is true, liable to be called on again, either

by the new or even the old, Collector; but his voucher protects him equally and perfectly against both. The new Collector will call where he has no evidence in hand that the tax has been paid. When the receipt or voucher shall be produced, his business *there* will be at an end.

If a Collector or his representatives were, in any event whatever, to lose, destroy, or withhold the books or lists, besides that the defaulter would be answerable for consequences (and we must recollect that a *breach* of law can never be *prevented* but must be *punished*,) the Corporation or its superintending officers, I repeat, would from it's own records, and for the original legitimate purpose, replace them, or such as would be effectual substitutes? Would the City in such a case be dependent on, or subject to the obstinacy, perverseness or misconduct, of one of its subordinate agents? The dignity and honor of our Government, the spirit of our people as well as their vital interests, would revolt at the thing. So much as to the "*effectual*" collection.

But after all, suppose even the possibility of a difficulty in the "*effectual*" collection of the taxes of the 3d and 4th wards, whence does it arise! From a defect in our own "*present laws.*" The taxes we know must be collected. We are authorised and bound to collect them If, because one branch of the Government exercises an indisputable right, which in its consequences happens to be disagreeable to, or disapproved by, a subordinate officer, he, instead of being an instrument in the execution of our laws, undertakes to thwart and defeat them, and can succeed in doing so, I say, respectfully, let our laws be amended. Let the present defect be supplied. Although the Councils cannot alter or disobey the charter, they can modify and improve their own laws, according to the lessons of experience and practice, so as to carry into complete effect the salutary provisions of the former.

Independent of other considerations, I presume the Board, from a correct sense of what is due to itself and to every branch of the honorable body of which it is a member, and eminently to the constituent body of our fellow citizens, will not suffer the constituted authorities, or either of them, to be trifled with. The Mayor has the right to remove "at his will and pleasure." The Corporation has "full power to lay and collect taxes." He feels that he has conscientiously done his duty. And he has every confidence that the two boards will do their duty.

To conclude, the Board knows that the taxes must be collected; that there is now no collector; that the Mayor and Board of Aldermen can appoint one; that they are bound to do so. Then let us do it. Not only can it be legally *done;* but it cannot legally be left *undone.* We know it is the duty of both of us, under more imperative obligations than one, "lawfully and faithfully to execute the duties of our offices." The Mayor cannot appoint permanently without the board. He performs, without shrinking from, the duty of nominating. They are to advise and consent; retaining and exercising the right of judging of, and deciding on, the merits of candidates presented to them.

Respectfully submitted,

JOHN P. VAN NESS, Mayor.

(To be read after the third paragraph, page Eight.

It is also ascertained and known, that the *usage* heretofore has been on appointments to vacancies in the Collectorship, for the Register to supply entire new lists, as in the cases of Brumley, Frank, and Coyle.

TO THE PRINTER:

Having been requested to furnish you with a copy of the written opinion, which I gave to the Mayor on the subject of the Collection of the Taxes due from the 3d and 4th Wards, (not collected, in consequence of the removal of Mr. Ingle,) pursuant to a resolution of the Board of Aldermen; I furnish you with the enclosed; which is not in fact a copy. as I preserved no copy thereof; but a transcript of my original notes and rough draft of the opinion in question; which in the final composition varied somewhat, in several respects from the original draught. The two notes here appended were not sent with the written opinion and formed no part of it, but have been written since. in consequence of hearing that the committee to whom that opinion was referred, entertained an apprehension that so much of the Act of the Corporation of the 12th of October, 1816, as directs the ward collectors "within 10 days after the expiration of the time they shall respectively act as such, to return to the Register the list of Taxes for the preceding year, which had been placed in their hands for collection," was virtually repealed by the Act of the 24th of May 1822; and that it would not be the duty of the Register, who is directed by law, on or before the first of January in each year, to place in the hands of the Collectors of taxes full lists of the taxes due in thier respective districts; to receive such lists or make out other lists, in the event of the death, resignation or removal of a Collector, until the month of December next. To remove, if possible, that apprehension, I have thought fit to subjoin those two explanatory notes.

TO THE MAYOR OF THE CITY OF WASHINGTON.

Washington, August 18, 1830.

Sir: I have received your communication, inclosing to me the resolution of the Board of Aldermen, requesting you to lay before that Board, at its next session, the opinion of the law officer of the Corporation, as to the power vested, by the present laws, in the Mayor and Board of Aldermen to fill the office of Collector of Taxes for the Third and

Fourth Wards, vacated by the *dismissal* of Joseph Ingle, late Collector; so as legally and effectually to provide for the collection of the taxes due in said wards, for the remainder of the current year." In discharge of my duty in that behalf, I beg leave to submit the following as my deliberate opinion upon that subject.

In examining the topics, involved in that resolution the first question which presents itself is *whether there be a vacancy in the office of Collector of Taxes for the Third and Fourth Wards?* I have understood that Mr. Ingle, about the beginning of the present year, was appointed duly to fill that office for the period of one year, which has not yet expired, and that the Mayor, by his own authority, removed him from office about the last of June, and nominated another person to the Board of Aldermen, to fill that office. It appears then that the Mayor has done all in his power to make the office vacant and, if he had the legitimate power of removal, there can be no doubt of the existence of such vacancy. As to the power of the Mayor to remove Mr. Ingle, from office, there appears to me no reasonable cause of doubt: the language of the Charter of the Corporation, approved the 15th of May, 1820, in section 3d, is as follows, the Mayor "shall nominate, and, with the consent of the Board of Aldermen, appoint to *all offices under the Corporation* (except Commissioners of Elections) and may remove *any such officer* from office at his will and pleasure." Here the power of the Mayor to remove from office Mr. Ingle, who was an officer under the Corporation, and not a commissioner of elections, is given in the most express and unequivocal terms. The office of Collector of Taxes for the Third and Fourth wards is then undeniably vacant.

The next question for consideration, is the power of the Mayor and Board of Aldermen to fill the vacancy? On this subject the language of the charter, in the same section seems to me to be no less clear and explicit than on the subject of the power of removal; the words are, "he shall appoint persons to fill up all vacancies which may occur during the recess of the Board of Aldermen, to hold such appointments until the end of the then ensuing session." The power and duty of the Mayor, here expressed, to fill up all vacancies which may occur during the recess of the Board of Aldermen, necessarily and unavoidably imply the right of the Mayor and Board of Aldermen, at the next session of that Board to fill up such vacancies permanently. The

only possible reason why the Mayor's appointment should be limited to the end of the next session of the Board of Aldermen, must be that his appointment might be approved of by that Board, or vacated at their first convention thereafter. And it would have been vain and futile to reserve that check upon the appointing power of the Mayor, if he and the Board of Aldermen together could not exercise that power when such convention should take place. If such power did not exist, there would be a necessity, either that the officer removed should relapse into the office, which would be defeating the power of the Mayor to remove; or the office must remain vacant until the end of the year, which would be contrary to all rules of construction. This power, thus conferred upon the Mayor by the charter of 1820, is the same in its nature as the power conferred by the Constitution upon the President of the United States, of appointment to and removal from office; with this only difference, that the charter grants the power of removal in express terms, while the Constitution only grants it by necessary implication. Necessary, because, he has conferred upon him the power of making all appointments, with the approbation of the Senate, and is expressly restrained from removing Judges only, from which limitation the power to remove all others is unavoidably implied. The President, without an express grant of the power by the constitution, has always exercised the power both of removal from office at pleasure and of making new appointments; and the exercise of these powers has never been called in question, except so far as the right of removal is involved. Some doubt, it is true, has been expressed faintly as to the President's power of removal; but I think the right of the Senate to approve a nomination by the President to fill a vacancy, no matter how created, has never been disputed: and, as the power of removal exercised by the Mayor cannot in reason, be a matter of doubt, I cannot perceive how there can be a doubt with regard to the power of making an appointment to fill a vacancy thus created. If however, there could be a doubt as to the construction of the charter, that doubt must be immediately dispelled by reading the ordinance of the Corporation, of 4th November, 1820, which speaks on that subject in the following words: "that it shall be, and it is hereby declared to be the duty of the Mayor, on or about the first day of January annually, and also whenever a vacancy shall happen by death, resignation, *removal* or otherwise, to nominate, and by and with the ad-

vice and consent of the Board of Aldermen, appoint one discreet person, &c. resident of the third and fourth wards, as Collector of Taxes in the said wards." Here the power of making a vacancy by removal, is expressly recognized, and it is made the duty of the Mayor, whenever such vacancy may happen, to nominate, and by and with the advice and consent of the Board of Aldermen to appoint a discreet person to fill such vacancy. Can any thing be more clear and explicit than this legislative recognition of both the powers under investigation?

The remaining subject of inquiry is whether the foregoing powers can be exercised, according to the existing laws of the Corporation, in such a manner as legally and effectually to provide for the collectian of the taxes due in the Third and Fourth Wards, for the remainder of the current year? In the examination of this question it will be necessary to see what were the duties and obligations of the Collector, who has been removed before the expiration of the year, and how he was compellable to conduct himself during his continuance in office, and upon his removal therefrom. Every Collector of Taxes, upon his appointment to office, before he can enter upon the duties thereof, is required by the existing laws to enter into Bond with sufficient security the penalty of which shall be double the amount of the list of taxes put into his hand for collection, and the condition of which shall be "that if the above bound —— as Collector for the —— wards of the City shall diligently, faithfully and honestly execute, perform and fulfil all the duties required of him by an act of the City Councils, entitled an Act for the appointment of Ward Collectors and for other purposes; or which may be imposed on him by any future Act or Acts of the said City Councils then the obligation to become void," &c. (See Acts of 30th October, 1815, and 4th of November, 1820.) Upon the Collector filing such bond with the Register of the City, it is made the duty of the Register "to place in the hands of such Collector the whole amount of taxes for collection, according to the rules prescribed by the laws of the Corporation;" and upon the receipt of such lists of taxes by such Collector from the Register; it is made the duty of the Collector "to do and perform all such matters and things as have or may be imposed on them by the laws of the Corporation, to collect all taxes placed in their respective hands for collection, by the Register, and deposit all monies by them received, on or before the first day every month, in the Bank of Washington,

to the credit of the ward for which the same shall be received" and, "on the first Monday in every month, return to the Register an account of his receipts" under the acts of the Corporation. It is further provided that the Register shall take from the Collectors receipts for the lists of taxes placed in their hands for collection, and, by the 3d section of the Act of 12th October, 1816,* that it "shall be the duty of said Collectors, *within* 10 *days after the expiration of the time they shall respectively act as such;* to return to the Register *the list of taxes for the preceding year; which had been placed in thier hands for collection*, noting opposite the name of each person on the said lists, whether the taxes charged to such person, or any part thereof, had been paid, and by whom, and, if not paid, the reason why; with such other remark, as may be explanatory of the case." And the performance of these duties and requirements is enforced by sundry penalties and disqualifications.

Thus it appears, that by virtue of the existing laws of the Corporation, the late Collector of the Third and Fourth Wards was bound to give Bond and Security for the faithful performance of his duties, and a receipt for the list of taxes put into his hands for collection; that he was bound to collect those taxes as far as he could, and deposit the money collected, on the first of every month, in the Bank of Washington, to the credit of the proper wards; and, on the first Monday in every month, to account with the Register for his receipts; which Register was bound to give him credit for all such sums as he may have deposited in bank to the credit of the proper wards: and finally that he was bound, within ten days after the expiration of the time for which he acted as Collector; that is, within ten days after his removal from office, to return to the Register *the list of taxes* which he had received for collection; meaning necessarily the list of taxes for the preceding year, that being the only list then in his hands for collection; shewing what part thereof has been collected and what remains still unpaid, together with the reasons why such part has not been paid. If the late Collector has performed and fulfilled all those duties and requirements, clearly and expressly imposed by the existing laws of the Corporation, there is no difficulty in comprehending how his successor may and ought to proceed in the legal and effectual collection of the taxes, which remain to be collected and which are due and collectible in the current year. It would certainly be the duty of the successor

before entering upon the other duties of his office, to file a bond with security, as provided by the act of the 4th November, 1820; thereupon he would be bound by that bond and the existing laws of the Corporation, and would have the full right and authority, to do and perform every thing in relation to the collection of the taxes remaining uncollected, which his predecessor was bound and had authority to do and perform in relation to the whole list of taxes which was put into his hands for collection by the Register in the beginning of the current year; to make similar deposits, at Bank, of the monies collected, and to make similar returns thereof to the Register; and, in short, the duties and powers of the successor would be the same in every respect as the predecessor's would have been, if he had continued in office until the end of the current year. It would also be the duty of the Register to receive back the list of taxes placed in the hands of the late Collector, to settle and adjust his account; to ascertain what part of the said taxes had been collected before the removal, and paid into Bank, and what part remained due, from whom, and why such taxes had not been paid, and generally to settle with him in the same manner as if he had voluntarily resigned his office. That business being fully adjusted and the new Collector having filed his official bond according to law, it would then be the duty of the Register, to place in the hands of the new Collector the same list of taxes returned by his predecessor, noted, credited and balanced as directed by law, so as to shew what part of the said taxes remained to be collected, and to take his receipt for such list, in which it should be distinctly expressed what amount of the taxes still remained due: or the Register might make out a new list, of the uncollected taxes only, and place that in the hands of the new Collector instead of the original list;† and this last would perhaps be the safer course, as some obscurity and difficulty might grow out of the same list being successively in the hands of two different collectors, each of whom would have been compelled to make written entries and notes upon the same: however this evil would only be remotely probable, and would be not at all to be apprehended, if the Collectors are in the practice of making their entries and notes on the tax list in their own hand-writing and those hands-writing are distinctly characteristic.

But it may be asked, if the late Collector should fail to fulfil the duties imposed upon him by law, is there any remedy at law for enforcing such fulfilment? If he has

neglected to return the list of taxes for the last year to the Register and settle his account thereof; as required by the 3d sec. of the Act of the 12th of October, 1816, and the 1st sec. of the act of 1822, and shall refuse to do so, what lawfull redress will the Corporation have against such default? To which it may be replied that the Corporation will have every remedy that would be available in the event of the death or resignation of a Collector: for a vacancy occasioned by removal, by the act of the Mayor, would not make a case at all different, in point of law, from a vacancy occasioned by death or resignation. The remedies of the Corporation and the liabilities of the Collectors or their executors, administrators and sureties would, I think, be exactly the same. And the remedy against a failure to return the list of taxes, put into the Collectors hands for collection in the current year, would be the same as if the Collector of the Taxes, at the end of a year, were to neglect or refuse to comply with that requisition of the law, or to settle his accounts with the Register. For such a neglect or refusal the ordinances of the Corporation, so far as my researches have gone, furnish but these remedies, to wit: first a forfeiture of $100 to the Corporation for neglecting or refusing to return the list of taxes put into his hands for collection; secondly a disability in the officer to fill the office of Collector for three years, if he neglect or refuse to settle his accounts with the Register; according to the requirements of the Acts of 1816 and 1822; and thirdly a suit to be brought on the Collector's Bond, according to the provision of the 8th sec. of the Act of 7th August, 1812, which last requires the Mayor to institute suits upon the Collectors' Bonds, if they fail to collect all the taxes, which can be collected, by the end of every year. And if it be objected that this provision of the law would not be violated, so as to render the suit available, in a case where the Collector was removed before the end of the year, and thus prevented from completing his collection, it may be replied, that if the collector of the taxes be prevented by the neglect or refusal of the removed Collector, to do such acts as may be necessary on his part to enable his successor to collect the taxes, the mischief would be the same as if he should remain the Collector and neglect or refuse to collect the taxes, for it would be by his default that the taxes were not collected, and the equity of the Act would make him liable for whatever damages might be sustained.

There are also remedies provided for such a delinquency

by the common law. The list of taxes is the property of the Corporation, and if, the Collector should contumaceously withold it after the 10 days from the time of his removal, it might be taken out of his hands by a writ of replevin. Or, upon a bill to account, being filed against the Collector. by the Corporation, in a Court of Equity, the Court would compel a production of the list into court, where either the Original or a copy might be obtained for the purposes of the Corporation immediately, and a contumaceous Collector would find it exceedingly difficult to overule the power and process of a Court of Chancery. Thus it seems to me, even if Mr. Ingle should choose to violate his duty, which can hardly be expected, as he could gain nothing by it and would be sure to incur much trouble and expense; that the laws of the Corporation, as they now exist, with the assistance of the common law, will furnish to the Corporation adequate remedy for any resistance which may be attempted by Mr Ingle to theeffectual Collection of the taxes remaining to be collected.

But it may be further objected that any or all these remedies would be slow in their operation, and that, while they were working their effect the Corporation would be suffering by the taxes being uncollected. And it is true that such difficulty might occur in this as in all other cases when resort must necessarily be had to the agency of Courts of law. This however is a necessary evil growing out of the wise caution of our system of jurisprudence, which will never suffer the tribunals to settle and adjust disputes, without affording all parties ample opportunity to bring before the Court the whole merits of their causes. One propitious remedy however is at hand, which will effectually obtain the object without much expenditure of time or labor; and that is for the register to make out an entire new list of the taxes for the current year in the third and fourth wards, noting what taxes have been paid, as far as he can ascertain from the returns already made to him by the late Collector; and place such list in the hands of the new Collector for collection, who might call upon all the persons charged with taxes in the two wards; and where they may have paid their taxes to the former Collector, give them credit, according to the receipts which they hold or the evidence which they may be able to produce of the payment of the taxes to the former collector. And, in a suit brought on the Collector's bond, proof would be admissable of all sums received by him and not accounted for and paid over

to the Bank. And if any person on the tax list cannot shew that he has paid his taxes to the former Collector before his removal, he will be liable to pay the same again to the Corporation.

Respectfully, your Obedient Servant,

HENRY ASHTON.

NOTES.

* It may be apprehended by some, that this provision of the Act of the 12th of October 1816 has been repealed by the provisions of the Act of 24th May 1822: but upon a critical examination of the provisions of these acts, it will be found, that in this particular, there is no conflict between the two acts. The first provides that, within ten days after the expiration of the term of office, the Collector, shall return to the Register the list of taxes for the last year, put into their hands for collection: noting thereon what has been done in relation to the collection of those taxes and what remains yet to be done. The latter provides "that it shall be the duty of the several Collectors of taxes in the City of Washington, to render, on or before the 1st of December, in each year, to the Register, their respective accounts, shewing the whole amount Collected and from whom, the amount deposited in the City Treasury, the amount of taxes uncollected and by whom due, and the reasons why such taxes have not been collected. Here there does not appear to be any serious conflict, the last act not touching the immediate subject of the foregoing provision, for the return of the lists of taxes. The two provisions do not indeed seem to relate to the same subject matter: for by the first nothing is intended or directed but a return of the list of taxes, put into the hands of the Collectors, while the latter, not touching that subject at all, intends and directs only the settlement of the Collectors accounts; a thing also provided for in the same section of the Act of 1816 in the following words, "and it shall also be their duty, within the said period of ten days, to settle their respective accounts with the Register!" Here is the only point of conflict between the 3d section of the Act of 1816 and the first section of the Act of 1822, the first making it the duty of the Collectors to settle with the Register by the 10th day after the end of the term of office; the last requiring them to render their accounts on or before the first day of December in each year. It is true that the Act of 1822 speaks of the accounts to be rendered pretty much much in the same terms as those, used by the Act of 1816 in relation to the lists of taxes to be returned: but the accounts must be pretty of the same character with, and be very much like the list of taxes, and therefore the mention of one in the like terms as the other cannot be strained to make them the same. Two things howeover much alike are not the same, for the latin maxim is, "*nullum simile est idem.*"

But for the sake of the argument, let it be considered that the provision of the act of 1822 about the settlement of accounts, are in relation to the same subject, "*in pari materia:*" yet it by no means follows that the former is repealed by the latter, for either may be complied with.

without touching the other: thus the list may be returned without settling the account or the account may be settled without returning the list; for it is the Collectors account that is to be rendered by virtue of the Act of 1822, which may by possibillity, be different from the list of taxes put into his hands for collection; and thus the Collector might comply with the requisition of the Act by rendering *his account*, and refuse to return to the Register *the list* of taxes; whereby he might be unable to ascertain how the Collectors accounts were to be settled. And, even supposing that the Act of 1822 meant the same thing by *rendering their accounts*, as the act of 1816 meant by *returning the list of taxes*, yet the conflict would not be so direct or plain as to *imply* a repeal. The rule of law about construction in such cases is that if two statutes be passed on the same subject providing different methods of proceedings, and different penalties, they shall not be considered as repealing but cumulative acts, unless there be a clear design expressed by the legislature, to repeal the former statute, or there be a plain and manifest repugnancy between the two. On this head see (Bacon's Abridgement, vol. 6, page 373 title statute,) where the principles are thus stated. "Subsequent statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former statutes without negative words. Nor hath a later act of Parliment ever been construed to repeal a pryor act unless there be a contrariety or repugnancy in them. or at least some notice taken in the latter law of the proceeding one, so as to indicate an intention in the law makers to repeal it. Neither is a law recited in a statute, without a clause of repeal, sufficient to repeal the positive provisions of a former statute. Again, in the same page, the law does not favor a repeal by implication, nor is it to be allowed, unless the repugnancy be quite plain, for as such repeal carries with it a reflection upon the wisdom of the former *Legislature*, it has ever been confined to the repealing as little as possible of the preceding statute. Again in the same page. "Although two acts of parliament are seemingly repugnant, yet, if there be no clause of "*non obstante*," in the latter, they shall, if possible, have such construction, that the latter may not be a repeal of the former by implication." Now; to apply these principles to the case in hand; the Act of 1816 has provided for the return of the tax lists to the Register by the Collectors, within ten days after the expiration of their time of serving in the office. The Act of 1822, provides that the Collectors, on or before the first day of every December shall render *their* accounts to the Register: The first under a penalty of $100, the latter under the penalty of three years disability to serve in the office. In the the Act of 1822 there is no clause of repeal nor any "*non instonti.*" so that there cannot be alledged any repeal of the Act of 1816 except by implication. As to repeals by implication we have seen that they are not favored by the law and that they cannot be allowed, unless the repugnancy be quite plain, and we have further seen that subsequent statutes, which add accumulative penalties and institute new methods of proceeding, do not repeal former penalties and methods of providing, ordained by other statutes, without negative words. But to make the most of it, the Act of of 1822 adds accumulative penalties and institutes new methods of proceeding; without a single negative expression as to the penalties and methods of proceeding ordered by the Act of 1816. Again it must be admitted that if this provision of the Act of 1816 be repealed, there would be no adequate remedy left or subsequently provided, or contained in the act of 1822 against a failure to return the tax list or make any settlement before the 1st of December, in any case of vacancy created by death, resignation or removal which would not only be a reflection on the wisdom of the former Legislature of the Corporation, but are all who have legislated on that subject since: There cannot therefore remain

any reasonable apprehension of a repeal of the Act of the 12th of October 1816 on the subject of the return of the tax lists, within ten days after the Collectors cease to hold their offices.

† If there be any doubt concerning the duty of the Register to receive the tax list from an ex-Collector upon his going out of office, before the first of December, or to deliver to a new Collector, appointed in the middle of the year, a list of the taxes to be collected in the district of the new Collector, at any time when it may be necessary, without regard to the first of January mentioned in the Acts of the Corporation; that doubt must vanish upon reading the 4th sec. of the Act of the 4th of April 1815 entitled an Act to authorize the appointment of a Register, and wherein it is provided as follows: it shall be the the duty of the Register "to superintend the collection of all *taxes* and monies due" to the Corporation. Can it be possible, seriously to think that he, who has intrusted to him the duty of superintending the collection of taxes, could doubt about its being his duty to put into the hand of the Collector the vouchers, without which he could not in the nature of things make any collections. Surely it can require no argument to prove that the Register, who is the only person having the means of doing it, is bound by every honest consideration to furnish any Collector with a list of taxes by him to be collected, whenever necessary, to enable him to perform that duty whether that necessity proceeded from the loss of a former list by him, or any other unavoidable calamity, or the contumacy of an ex-Collector.

TO R. S. COXE, ESQ.

Washington, August, 26th, 1830.

Dear Sir: Having more than once had the satisfaction to understand, and infer from what you said in conversation, your opinion on the questions now agitated in our City Councils, and particularly in our Board of Aldermen, whether the Mayor has the right to remove any incumbent in the office of Collector of Taxes? Whether he and the Board of Aldermen have a right, upon his nomination and their confirmation, to fill the vacancy? and whether the successor can as legally and effectually collect the remainder of the taxes standing on the list placed in the hands of the predecessor, as the latter could himself have done had he not been removed? I will thank you if you will be so obliging, in order to enable me to decide whether I understood you correctly, as to write me, in answer hereto, your opinion: and further, whether, by any act of legislation, the Councils can, either directly or indirectly, commit or assign the collection of those taxes to any other person than one nominated by the Mayor and confirmed by the Board of Aldermen?

I will, of course, not trouble you for a formal or argumentative opinion:—but a brief reply in the course of the morning will oblige Your obedient serv't.

JOHN P. VAN NESS.

TO JOHN P. VAN NESS, ESQ.

Washington, August 26th, 1830.

Dear Sir: I have had the pleasure to receive your communication of this morning. It has been my wish to avoid all public and gratuitous interference in the questions upon which so much diversity of opinion appears to exist among the City Authorities; but I have not scrupled, as a private citizen, whenever an opportunity presented itself, frankly and fully to state my opinions to my friends, whether they differed or concurred in my views. I cannot have any objection to communicate more precisely and distinctly to you in writing, what I have more than once done orally.

I entertain no doubt but that under the 3d section of the charter of the City, the Mayor has a full and absolute power and right of removing a Collector of Taxes from his office, and I have never heard this right denied or questioned. It appears to me as clear of doubt that the Mayor is equally entitled to nominate and with the consent of the Board of Aldermen, to appoint another person to fill the vacant office; this also I have never heard disputed. It is equally clear to my mind that the person thus appointed to this office upon the removal of the former incumbent, is invested with all the powers of his predecessor, and bound to perform all the duties which remain to be performed when such predecessor was removed, and consequently that he may legally and effectually collect the residue of the taxes standing on the list placed in the hands of his predecessor, as fully as said predecessor could have done had he not been removed. Upon the last question proposed I am very clearly of opinion that under the charter an act of the two councils, which should not only create an office but designate the individual who should discharge its duties, without a nomination and appointment by the Mayor, whether such designation be by naming the person, or referring to him by any description, as, for instance, as the person holding any other office, would be an assumption, by the legislative power, of executive functions not warranted by the charter.

If I have correctly apprehended your interrogatories the foregoing embraces a distinct answer to each of them, and upon the last, I understand, that in an analogous case the Supreme Court has given its sanction to the opinion I have expressed. Yours, &c.

RICHARD S. COXE.

LIBRARY OF CONGRESS
0 006 148 316 0